Supreme Court, U.S.
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No. 01-1608

In The
Supreme Court of the United States

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.,

Petitioner,

v.

THE CIRCLE K CORPORATION, DEBTOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

MARTHA E. GIBBS
Counsel of Record
CHRISTOPHER H. BAYLEY
LORI A. SCHMIG
SNELL & WILMER L.L.P.
One Arizona Center
Phoenix, Arizona 85004-2202
(602) 382-6000
(602) 382-6070 Facsimile

Counsel for Respondent
The Circle K Corporation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is a bankruptcy estate professional's final fee application subject to review for reasonableness under 11 U.S.C. § 330 rather than exempt from such review under 11 U.S.C. § 328, when

a. neither the retention application nor the retention order specified that the retention was to be pursuant to section 328; and

b. neither the retention application nor the retention order specified that the fees sought were to be pre-approved and not subject to further review for reasonableness?

2. Did the Ninth Circuit Court of Appeals act properly when it applied its decision to the parties before it, rather making its ruling purely prospective?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Houlihan, Lokey, Howard & Zukin, Inc., a California corporation ("Houlihan Lokey"). Respondent is Circle K Stores Inc., a Texas corporation, f/k/a The Circle K Corporation ("Circle K"), the debtor in the underlying bankruptcy proceeding. Circle K is not a public company.

PARENT COMPANY OF CIRCLE K:

The parent company of Circle K is The Circle K Corporation, a Delaware corporation, which is wholly owned by Tosco Corporation, a Nevada corporation, a wholly owned subsidiary of Phillips Petroleum Company, a Delaware corporation. Phillips Petroleum Company is a public company.

SUBSIDIARIES AND AFFILIATES:

Circle K has the following subsidiaries:

- TMC Franchise Corporation, an Arizona corporation
- Spirit Enterprises, Inc., a Delaware corporation
- Circle K Enterprises, Inc., a Delaware corporation
- Circle K Licensing Company, Inc., a Texas corporation
- K-Cal Ventures L.L.C., an Arizona limited liability company

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OPINIONS BELOW

The December 5, 2001 opinion of the court of appeals (Pet. App. 14a-25a) is reported at 272 F.3d 1150 (9th Cir. 2001). The January 30, 2002 Order and Amended Opinion (Pet. App. 1a-13a) is reported at 279 F.3d 669 (9th Cir. 2002). The two decisions of the United States District Court for the District of Arizona (Pet. App. 43a-52a and 26a-40a, respectively) are unreported. The decision of the United States Bankruptcy Court for the District of Arizona (Pet. 53a-72a) is reported at 191 B.R. 426 (Bankr. D. Ariz. 1996).

JURISDICTION

The Ninth Circuit entered its decision on December 5, 2001. Petitioner timely filed a petition for rehearing and rehearing *en banc* was denied on January 30, 2002. The Ninth Circuit filed its Order and Amended Opinion on January 30, 2002. Petitioner filed its Petition for Writ of Certiorari on April 30, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves application of portions of the Bankruptcy Reform Act of 1978, as amended, found in Title 11 of the United States Code §§ 101, *et seq.* (the "Bankruptcy Code"). Bankruptcy Code § 1103(a) authorizes the employment of professional persons to represent or assist officially created committees in Chapter 11 proceedings.

11 U.S.C. § 327(a) provides, in relevant part, that the trustee, with the court's approval, may employ "professional persons that do not hold or represent an interest adverse to the estate, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 330 authorizes the compensation and reimbursement of expenses of professionals retained in a case. It also sets forth the standards pursuant to which the amount of compensation is to be determined. 11 U.S.C. § 330(a)(1)(A) provides that *after notice and a hearing* and subject to section 328, the court may award a professional person employed under section 327 a *reasonable* compensation for actual, necessary services rendered by the professional person. (emphasis added). Section 330 also provides that the court may award compensation that is less than the amount of compensation that is requested. 11 U.S.C. § 330(a)(2).

However, if a professional is retained pursuant to section 328, an analysis under section 330 is subject to the limitations found in section 328.

Bankruptcy Code § 328(a) provides:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in

light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a).

The full text of sections 328 and 330 is set forth in Pet. App. 109a-114a.

STATEMENT OF THE CASE

At issue in this case is the clarity with which a professional must specify the nature of its retention in a bankruptcy proceeding. Section 328 of the Bankruptcy Code permits a bankruptcy court to approve in advance the fee arrangement of a professional retained by the bankruptcy estate. Where a bankruptcy court gives prior approval to a fee agreement pursuant to section 328(a), the bankruptcy court is prohibited from later evaluating the final fee application under the "reasonableness" standard of section 330. It is, instead, limited to determining whether the pre-approved fee agreement was improvident based on unforeseen developments.

Houlihan Lokey contends that it sufficiently specified at the beginning of the bankruptcy case that the bankruptcy court pre-approved its compensation pursuant to section 328 even though:

(1) the retention application prepared and filed by Houlihan Lokey stated neither that it sought retention pursuant to section 328, nor that the fees and costs sought were to be pre-approved and not subject to further review pursuant to section 330 for reasonableness. Pet. App. 73a-94a.

(2) the retention application filed by Houlihan Lokey affirmatively stated that it remained subject to subsequent bankruptcy court approval in a final fee application. Pet. App. 77a.

(3) the bankruptcy court order approving Houlihan Lokey's retention stated neither that the retention was to be pursuant to section 328 nor that the fees sought were to be pre-approved and not subject to further review for reasonableness. Pet. App. 97a-99a.

(4) the bankruptcy court order approving Houlihan Lokey's retention expressly stated that the fees set forth in the order are "subject to review by the court in a final fee application pursuant to relevant provisions of the Bankruptcy Code." Pet. App. 99a.

Upon consideration of Houlihan Lokey's fee application at the conclusion of the bankruptcy case, the bankruptcy court disagreed that Houlihan Lokey had applied for retention under section 328, concluding in a published opinion that "it is disingenuous to now assert section 328 applies and the Court can only examine whether the employment agreement was improvident." Pet. App. 71a. The court reviewed Houlihan Lokey's fees for reasonableness pursuant to section 330(a), and disallowed one-half of Houlihan Lokey's requested fees. Pet. App. 71a.

On appeal, the district court determined that Houlihan Lokey had been employed pursuant to section 328, and reversed and remanded the case to the bankruptcy court, with instructions that the bankruptcy court was to grant Houlihan Lokey's fees pursuant to section 328(a) unless it found that the terms and conditions of Houlihan Lokey's retention were "improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions." Pet. App. 52a.

On remand, the bankruptcy court stated that when it approved the retention of Houlihan Lokey, it intended to enter a section 330 order, under which Houlihan Lokey would submit a fee application to the bankruptcy court for a determination that the fees were reasonable, actual, and necessary. The court stated, "I don't have any difficulty in agreeing with the debtor that what my intent was in the [Houlihan Lokey] appointment order was to enter what's essentially a section 330 order, and I frankly thought I was." Resp. App. 4a. The bankruptcy court nonetheless entered an order granting Houlihan Lokey the full amount of fees and costs requested, as well as interest and attorney's fees. Resp. App. 6a-9a. Circle K appealed to the district court. The district court upheld the bankruptcy court's order, Pet. App. 26a-40a, and Circle K timely appealed to the Ninth Circuit Court of Appeals.

On appeal, the Ninth Circuit held that unless a professional's retention application unambiguously specifies that it seeks approval under section 328, it is subject to review under section 330. Pet. App. at 7a.

ARGUMENT

1. There Is No Split Among the Circuits On An Important Issue Of Federal Law.

The decision of the court of appeals is correct, and does not conflict with any decision of this Court.

Houlihan Lokey asserts that there is a split between the Fifth and Ninth Circuits regarding the treatment of retention applications that requires this Court's review. However, the Fifth Circuit case cited by Houlihan Lokey may be distinguished from the Ninth Circuit decision on

the same issue. Further, no other court of appeals has directly addressed the issue. The Ninth Circuit, however, has expressed the majority view as well as the correct rule, in that the bankruptcy courts in other circuits which have addressed the issue agree with the Ninth Circuit. Finally, having different rules regarding retention applications in different circuits will not cause any practical operational problems, as retentions are generally highly localized and court specific, and subject to local rules and practices. Accordingly, under all the circumstances, further review is not warranted or necessary.

a. No Split in Authority.

Houlihan Lokey asserts that the Ninth Circuit's opinion splits from that of the Fifth Circuit expressed in *In re National Gypsum Company*, 123 F.3d 861 (5th Cir. 1991). In *National Gypsum*, the court determined that a retention order for a financial advisor was entered pursuant to section 328, and that therefore review of the fee application was limited to whether the fee arrangement approved in the retention order was improvident. *Id.* at 863.

The *National Gypsum* case may be distinguished in several ways. First, the Fifth Circuit did not state in its decision whether or not the retention application and the retention order (a) mentioned section 328,[1] or (b) indicated

[1] The Ninth Circuit stated in its opinion that section "328 was not specified in the retention application" in the *National Gypsum* case. Pet. App. 25a. However, the Fifth Circuit opinion in *National Gypsum* does not indicate whether or not the retention application specifically mentioned section 328. *National Gypsum*, 123 F.3d at 862-4.

that the professional compensation was to be pre-approved. *Id.* In contrast, these facts were crucial to the Ninth Circuit decision. Pet. App. 11a.

Second, in *National Gypsum*, the financial advisor made *three* (3) applications for interim compensation. The financial advisor received no objection to the fee arrangement until it made its final fee application. *National Gypsum*, 123 F.3d at 862. The fact that multiple fee applications were filed without objection indicates that perhaps the retention application and order in *National Gypsum* were more clear than the application and order in the present case, where Houlihan Lokey's sole fee application drew a timely objection from Circle K.

The only similarity between this and the *National Gypsum* case is that in both cases, the court expressly retained the right to approve the professional's fees. *Id.*; Pet. App. 77a, 99a. The Fifth Circuit did not find the retention of the right to review the fees inconsistent with a section 328 application. *National Gypsum*, 123 F.3d at 863. The Ninth Circuit stated that it disagreed with the Fifth Circuit. "In this Circuit, unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. To ensure that § 328 governs the review of a professional's fees, a professional must invoke the section explicitly in the retention application." Pet. App. 24a-25a. The Ninth Circuit's disagreement with the Fifth Circuit thus seems to be based more upon whether section 328 must be specifically invoked in a retention application, an issue the Fifth Circuit was actually *silent* upon,[2] than upon whether

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[2] See FN1, *supra*.

a reservation of the court's right to review fees for reasonableness makes a retention application/order ambiguous. Therefore, the Ninth Circuit and the Fifth Circuit do not appear to have actually disagreed upon any real issue.

b. Ninth Circuit Decision Represents Majority View.

As demonstrated above, there is no real split between the Fifth and Ninth Circuits on the issue of the specificity of retention applications. Even if there is a split, it does not reflect a major difference that must be resolved by this Court. No other court of appeals has addressed the issue directly. However, the Ninth Circuit seems to have expressed the majority view as well as the correct rule.

The only other court of appeals to consider a section 328 retention application held that a financial advisor who does not clearly set forth the terms that it wishes to have pre-approved may not avoid a subsequent review of the terms for reasonableness under section 330. *Zolfo, Cooper & Co. v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253, 261-62 (3d Cir. 1995). In *Zolfo*, the accounting firm's affidavit in support of the retention application stated the specific terms and conditions of employment, but the order approving the retention merely referred to the affidavit, without setting forth the specific rates in the order itself. Judge Scirica, writing for the Third Circuit, explained " . . . the burden should rest on the applicant to ensure that the court notes explicitly the terms and conditions if the applicant expects them to be established at that early point." *Id.* at 262. While the issue addressed by the Third Circuit is different, the spirit of the decision is more similar to that of the Ninth Circuit in this case, than to

the Fifth Circuit in *National Gypsum*. Professionals who seek to be retained in a bankruptcy case bear the burden of ensuring that their retention application and order is sufficiently clear to give the court and interested parties notice of the terms of the retention.

The bankruptcy courts which have addressed the issue have sided with the Ninth Circuit. *See In re Northeast Express Reg'l Airlines, Inc.*, 235 B.R. 695, 699 (Bankr. D. Maine 1999) (court discussed *National Gypsum*, but found that language in the employment agreement at issue, "all fees and expenses shall remain subject to review and approval by this Court," effectively preserved the court's power to conduct an 11 U.S.C. section 330 review); *In re Olympic Marine Servs., Inc.*, 186 B.R. 651, 652, 654 (Bankr. E.D. Va. 1995) (order approving employment application and stating that any application for compensation would be "subject to further review of the court" did not limit review to improvidence inquiry under section 328).

There is no pressing reason for the Court to review the Ninth Circuit decision. There is no disagreement in any circuit on the major issue: that a retention application and order must unambiguously invoke section 328, or it will be subject to a subsequent section 330 review for reasonableness.

2. Application of the Ninth Circuit's Decision To The Parties Before It Does Not Warrant This Court's Review.

Houlihan Lokey claims that the Ninth Circuit's decision was an articulation of new law, which cannot be applied "retroactively" to Houlihan Lokey. To the contrary,

the Ninth Circuit merely made clear that an application and order for retention of a bankruptcy professional must be clear and unambiguous, and found that Houlihan Lokey's application and order were not.

a. The Ninth Circuit's Decision Was Not An Overruling Decision.

Houlihan Lokey characterizes the Ninth Circuit's decision as requiring "magic words," which were not previously required, in order to characterize a retention as one under section 328. This is not the case. The Ninth Circuit made clear in its decision that its concern is that a professional must unambiguously specify that it seeks approval under section 328, or it will be subject to review under section 330. Pet. App. 7a. The Ninth Circuit found that Houlihan Lokey's retention application was ambiguous not only because it did not specifically refer to section 328, but also because it provided that "all fees so paid remain subject to subsequent Bankruptcy Court approval in a final fee application to be submitted to the Court." Pet. App. 11a. The Ninth Circuit also stated that other circumstances indicated that the retention was ambiguous, namely (1) that the retention order made no reference to either section 328 or section 330, (2) the retention order explicitly stated that Houlihan Lokey's fees were subject to review by the court in a final fee application, (3) the bankruptcy court's stated belief that it had not unconditionally approved Houlihan Lokey's fees, and (4) the fact that another professional in the case did explicitly specify section 328 in its retention application, and the order approving that retention was much more clear than the Houlihan Lokey retention order. Pet. App. 11a-12a. The Ninth Circuit cited all of these facts in its ruling that the

circumstances did not indicate that section 328 approval was unambiguously sought by Houlihan Lokey in its retention application, and granted by the Bankruptcy Court in its retention order.

Houlihan Lokey argues that the Ninth Circuit has created a new bright-line test that it impermissibly applied retroactively to the parties before it. The Ninth Circuit indicated in its opinion that professionals seeking retention under section 328 should explicitly cite section 328 in their retention applications. Pet. App. 13a. However, given the Ninth Circuit's recitation of the myriad ambiguities surrounding Houlihan Lokey's retention (Pet. App. 11a-12a) there is nothing in the Ninth Circuit opinion which suggests that the opinion was based on the mere failure of Houlihan Lokey to recite section 328.

It has always been the law, in the Ninth Circuit and in other circuits, that a professional seeking retention under section 328 must do so clearly and unambiguously, so as to give other parties notice that there will be no further opportunity to review the fee arrangement for reasonableness. The "deference afforded under section 328 does not apply unless the appointment order 'expressly and unambiguously states specific terms and conditions (*e.g.*, specific hourly rate or contingency fee arrangements)' that are being approved pursuant to the first sentence of section 328." *In re Gillette Holdings, Inc.*, 143 B.R. 256, 259 (Bankr. D. Colo. 1992), quoting *In re C&P Auto Transport, Inc.*, 94 B.R. 682, 685, n. 4 (Bankr. E.D. Cal. 1988). *See also, Zolfo, Cooper & Co. v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253, 261-62 (3d Cir. 1995) ("The bankruptcy court's duty to conduct an independent examination of fee applications for services rendered would be unduly restricted if employment authorization order were routinely construed

as binding the court to particular terms of employment.") (citation omitted). It was previously held within the Ninth Circuit that, where it is ambiguous whether the parties intended to limit, pursuant to section 328(a), the Bankruptcy Court's authority in awarding attorney's fees, the Bankruptcy Court is permitted to authorize a reasonable fee pursuant to 11 U.S.C. § 330. *In re Campos*, 166 B.R. 914, 917 (N.D. Cal. 1994). In *Campos*, the United States District Court held that an order approving compensation was ambiguous as to whether the terms for compensation were being pre-approved pursuant to section 328(a) where (1) the order cited no statutory authority, (2) the order authorized employment on specific terms, yet (3) the order specified that a reasonable fee was to be paid on application to the court. As a result, the District Court held that the Bankruptcy Court's review of the fee application pursuant to section 330(a) for reasonableness was not clearly erroneous. Prior case law within the Ninth Circuit is clear: a professional seeking retention under section 328(a) must unambiguously state that it is so doing. The recent Ninth Circuit opinion does not overrule or disagree with any authority within the Ninth Circuit, or indeed, any authority other than that of the Fifth Circuit in *National Gypsum*. To professionals employed by bankruptcy estates, the Ninth Circuit's opinion was nothing new.

b. Ninth Circuit Properly Applied its Decision to the Parties Before It.

The case law which Houlihan Lokey cites in support of its argument that retroactive application of the "new test" is prohibited does not address the current factual situation, where the test is being applied to the parties before

the court. This Court has either made its decisions fully retroactive (applied to the parties before the Court and all cases currently pending in the system), selectively prospective (applied to the parties before the court but not to the other cases still pending), or purely prospective (applied only to cases filed after the decision). *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 525-36 (1991). Houlihan Lokey urges that the Court rule that the decision of the Ninth Circuit not be applied to it, but rather be applied only purely prospectively to later cases.

None of the cases cited by Houlihan Lokey address whether a decision shall be applied purely prospectively. Every case relied upon by Houlihan Lokey is a case in which the court is determining whether selective prospectivity is appropriate.[3]

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[3] For example, the main case upon which Houlihan Lokey relies is *Chevron Oil v. Huson*, 404 U.S. 97 (1971). The issue in *Chevron Oil* was whether the time for bringing the action was governed by a state statute of limitations, in which case the action was time-barred, or by the admiralty law doctrine of laches, in which case it was not. While the case was pending before the district court, the Supreme Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), that state law rather than admiralty law applies in such cases. The issue before the Supreme Court in *Chevron Oil* was thus whether "*Rodrigue* should . . . be applied retroactively to bar actions filed before the date of its announcement." 404 U.S. at 99. The Court held that state statutes of limitations made applicable under *Rodrigue* "should not be applied retroactively." 404 U.S. at 108 n. 10.

Chevron Oil is thus distinguishable from this case: it was not the law-changing case; *Rodrigue* was. And the rule of law announced in *Rodrigue* was applied to the litigants before the court in that case. *See Rodrigue*, 395 U.S. at 366. Thus, *Chevron Oil* was not an example of purely prospective decision-making. Rather, it was a straight-forward example of selective prospectivity.

This Court still has not resolved whether purely prospective decision-making is consistent with the constitutional role of the judiciary. The general rule is that judicial decisions are fully retroactive, applicable to all pending and future cases. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). Contrary to the cases cited by Houlihan Lokey, it is now settled that selective prospectivity is not permitted: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review, as to all events regardless of whether such events predate or postdate [the] announcement of the rule." *Id.*

In *Chevron Oil*, 404 U.S. 97, the Court recognized the possibility of purely prospective rulings in extraordinary cases, but the continuing vitality of that doctrine remains in doubt as members of the Court have questioned its compatibility with the judicial function of declaring what the law is rather than deciding what it should be. In *James B. Beam*, Justice Souter noted that purely prospective adjudication is wholly unknown and unavailable: "Retroactive application could hardly [be] denied the litigant in the law changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace." 509 U.S. at 537. With respect to civil cases, Justice Souter questioned whether "pure prospectivity may be had at all," but refused to "speculate as to the bounds or propriety of pure prospectivity." *Id.* at 541, 544.

In *Harper*, this Court held that its own decisions must apply retroactively, even if they announce new rules of law. The Court explicitly rejected the technique of "selective"

prospectivity, under which a new rule would apply to the decision in which it was announced, but to no other cases involving pre-decision events. 509 U.S. at 107. But more importantly for the present case, the Court's broad language cast grave doubt on the permissibility of "pure" prospectivity, under which a new rule would not apply even to the decision in which it was announced. *Id.* ("'[T]he nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." (citation omitted)).

c. Application of Ninth Circuit Decision Does Not Prejudice Houlihan Lokey.

In any case, the debate over the propriety of purely prospective judicial decisions can wait for another day. Even if the three-part test of *Chevron Oil* is applied, the Ninth Circuit's decision must be applied to Houlihan Lokey.

First, a "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106 (citations omitted). Here, the Ninth Circuit did not resolve issues of first impression, and did not change the existing law.

Second, *Chevron Oil* "looked to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation." 404 U.S. at 107 (citation omitted). In this case, applying the Ninth Circuit's decision to the parties before it is the only way to accomplish the goal of the decision, which is to

place the burden of ensuring that the terms of a professional's retention are unambiguously disclosed on the professional, so that the parties know at the time of the retention whether the terms are being pre-approved, or whether there will be a further opportunity to object to the reasonableness of the proposed terms.

Third, *Chevron Oil* "weighed the inequity imposed by retroactive application . . . ." *Id.* Houlihan Lokey asserts that it is inequitable to subject it to the loss of the fees that it claims the Bankruptcy Court pre-approved. But what would be truly inequitable would be to permit a professional like Houlihan Lokey to sidestep initial scrutiny of its fees at the retention stage, by not clearly indicating that it was seeking pre-approval of all of its fees, and then also foreclose any later review of the fees for reasonableness. The Ninth Circuit decision ensures that all fee arrangements, whether under section 328 or section 330, will be scrutinized at some point, either at the beginning of the case when a retention application that clearly invokes section 328 and seeks pre-approval of fees is filed, or at the end of the case, when a fee application is filed and reviewed under section 330 for reasonableness. Applying the decision to Houlihan Lokey is the only way to ensure that Houlihan Lokey's fee arrangement is reviewed at all. Upon review, Houlihan Lokey will only face the risk of loss of those fees that the court deems were not reasonable or necessary to the reorganization of the debtor. Houlihan Lokey will still be entitled to any fees that the court finds are reasonable.

d. Intent of the Parties

Houlihan Lokey contends that the application of the Ninth Circuit's decision to the parties before it is contrary to the parties' intent. As evidence of the parties' intent, Houlihan Lokey cites only the January 17, 1996 order of the bankruptcy court, in which the court mused that "the parties appear to have contemplated a flat fee arrangement." Pet. 7, citing Pet. App. 67a-68a. This is evidence that the parties contemplated a flat fee, not that the parties contemplated that the flat fee would be pre-approved. In fact, in the *same order*, the bankruptcy court stated that Houlihan Lokey was "disingenuous" in later trying to characterize its retention application as one under section 328. Pet. App. 71a.

Far better evidence of the parties' intent are the words of Houlihan Lokey: In its final fee application, Houlihan Lokey clearly stated that it sought approval of its fees "pursuant to section 327 and 330 of Title 11 of the United States Bankruptcy Code." Resp. App. 11a. Elsewhere in its final fee application, Houlihan Lokey asked the bankruptcy court to find that the "compensation and reimbursement of expenses requested herein are *reasonable and necessary and commensurate with the benefits received by the estate and therefore should be approved.*" Resp. App. 12a (emphasis added). And in a pleading related to its motion for reconsideration of the bankruptcy court's order disallowing a portion of its fees, Houlihan Lokey stated that it was *not clear whether Houlihan Lokey had been retained under section 328 or 330.* Resp. App. 18a (emphasis added). Elsewhere in the same pleading, Houlihan Lokey stated:

> Houlihan Lokey's Retention Application and Retention Order *cited to no Code sections* as governing the terms of its retention. Given the lack of consistency in the applications filed in the case, *it is far from clear* under which Code section or sections Houlihan Lokey's retention (and subsequent compensation) should be reviewed.

Resp. App. 16a (emphasis added).

The Ninth Circuit held that Houlihan Lokey did not unambiguously specify that it was to be retained under section 328 rather than section 330. It is not unfair to "retroactively" apply this ruling to Houlihan Lokey. Houlihan Lokey has admitted repeatedly during the underlying proceedings that even it was not sure under what standard it had been retained. These prior statements belie Houlihan Lokey's current claim that the application of the Ninth Circuit decision would defeat Houlihan Lokey's expectations and the parties' intent. Houlihan Lokey's own admissions indicate that it had no justified expectations, and no clear intent.

CONCLUSION

Circle K respectfully submits that the petition for a writ of certiorari should be denied. There is no real conflict between the Ninth Circuit and the Fifth Circuit on an important issue that must be resolved. Further, there is no reason that the Ninth Circuit's application of its decision to the parties before it should be disturbed.

Respectfully submitted,

MARTHA E. GIBBS
Counsel of Record
CHRISTOPHER H. BAYLEY
LORI A. SCHMIG
SNELL & WILMER L.L.P.
One Arizona Center
Phoenix, Arizona 85004-2202
(602) 382-6000
(602) 382-6070 Facsimile

Counsel for Respondent
The Circle K Corporation

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re.	)	
THE CIRCLE K CORPORATION	) CH. 11)	90-05052-PHX-GBN
MOTION FOR ENTRY OF ORDER APPROVING FEES AND COSTS FOR HOULIHAN, LOKEY, HOWARD & ZUKIN	)	

U.S. Bankruptcy Court
2929 N. Central Ave., 9th Floor
Phoenix, Arizona 85012

October 27, 1998
1:05 p.m.

BEFORE THE HONORABLE GEORGE B. NIELSEN, JR., Judge

APPEARANCES:

For the Debtor: Christopher H. Bayley
Steven Jerome
SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004-0001

For the U.S. Trustee: Paul A. Randolph
OFFICE OF THE UNITED STATES TRUSTEE
2929 N. Central Ave.,
Ste. 700
Phoenix, AZ 85012

For Houlihan, Lokey, Howard & Zukin:	Michael Kramer HOULIHAN, LOKEY, HOWARD & ZUKIN 31 West 52nd Street, 11th Floor New York, NY 10019
For Houlihan, Lokey, Howard & Zukin:	Thomas J. Salerno SQUIRE, SANDERS & DEMPSEY 40 N. Central Ave., Suite 2700 Phoenix, AZ 85004-4441

Proceedings recorded by electronic sound technician, Virginia Beeby; transcript produced by A/V Tronics, Inc.

[2] THE COURT: Good afternoon. Be seated.

THE CLERK: Case number 90-5052, *The Circle K Corporation*, and we do have a telephonic appearance.

THE COURT: This is Judge Nielsen. I'll take appearance on our phone line.

MR. KRAMER: Michael Kramer from Houlihan, Lokey.

THE COURT: all right, Mr. Kramer. And I'll take appearances now in the courtroom.

MR. SALERNO: Good afternoon, Your Honor. Thomas Salerno, Squire, Sanders & Dempsey on behalf of Houlihan, Lokey.

MR. RANDOLPH: Good afternoon. Paul Randolph with the U.S. Trustee. And, Your Honor, I'd like the Court's permission if necessary to excuse myself at about

25 or 28 after. I have a 1:30 hearing – if that's acceptable to the Court.

THE COURT: all right. Mr. Randolph, when you lose interest, you can just depart.

MR. RANDOLPH: No, no. We're very interested. Your Honor. Just short staffed.

THE COURT: Just for the next 25 minutes you will be.

All right. We're grateful for however much time we can have.

MR. BAYLEY: Afternoon, Your Honor. Christopher [3] Bayley here on behalf of Circle K. I also have with me here today from Circle K Catherine Krecke, in-house counsel, as well as Mr. Steve Jerome from my office as well.

THE COURT: All right. Noted.

Ladies and gentlemen, what I've reviewed in preparation for this hearing, I've gone back and looked at the prior pleadings that were filed in connection with this matter including the order of the United States District Court. I've reviewed the original motion that was filed here to set a hearing on this particular matter, the original response filed first of all by the U.S. Trustee, a reservation of rights, and then an opposition from the debtor. I've reviewed what the movant terms a first supplement, and a second supplement, and then a response that was filed by the debtor, and a reply submitted by the movant. And then, finally, the last think I've seen is the U.S. Trustee's statement of clarification regarding reservation of rights.

So if I've seen everything, I'm prepared to rule, but I'll first listen with interest to the comments of counsel.

To make any presentations meaningful, let me tell you what my initial inclination here is. And my initial inclination is that although neither I nor Mr. Bayley much like the reversal that was effectuated here by the district [4] court, that reversal and the remand is a fact. And I must operate within the scope of that remand. I don't have any difficulty in agreeing with the debtor that what my intent was in the appointment order was to enter what's essentially a § 330 order, and I frankly thought I was. But the district court feels that I was mistaken and that isn't what I intended to do. And with that, I guess we'll have to differ, but it isn't just simply a difference of opinion.

The superior court has ruled and established a relatively narrow area for us to operate in – on the remand. And I believe that area is indeed simply to determine whether there are circumstances existing which I didn't appreciate when I initially signed the appointment order.

That standard is more awkward in this case than perhaps normally, because I really – I didn't think I was entering a 328 order, but – so that makes the analysis perhaps even more tortured here. But the circumstances are governed by the district court. It's just not at all clear to me at this point that there are – that I can find happenings here which could not have been foreseen at the time I signed that original appointment order.

So I'm inclined to think what I should do is grant the motion and enter this particular order on remand, even though neither Mr. Bayley or I like it much.

* * *

[45] MR. BAYLEY: None, Your Honor.

THE COURT: We're adjourned. We're going to stay in session while these parties withdraw. We'll call our 1:45 calendar in a moment or two. I'm going to leave the line now.

(Proceedings Concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

November 5, 1998

/s/ [Illegible]
A/V Tronics
2715 N. Third Street,
Ste. 207
Phoenix, Arizona 85004

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: THE CIRCLE K CORPORATION, et al., Debtor.	In Proceedings Under Chapter 11 Case Nos. 90-5052-PHX-GBN To 90-5075-PHX-GBN
THE CIRCLE K CORPORATION, Movant, vs. HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., Respondent.	**ORDER AUTHORIZING AND ALLOWING FEES AND COSTS** (Filed Jan. 27, 1999)

This matter came before the Court pursuant to the "*Motion For Entry Of Order Approving Fees And Costs For Houlihan, Lokey, Howard & Zukin, Inc.*" filed on April 24, 1998 as supplemented pursuant to supplements filed on August 20, 1998, September 11, 1998, October 21, 1998 and December 18, 1998 (collectively the "Motion"). The Motion dealt with the request for allowance of the professional fees incurred by HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. ("Houlihan Lokey") as a result of services rendered to, *inter alia*, the Official Committee of Debentureholders in the above-captioned Chapter 11 proceeding. The Court held hearings on the Houlihan Lokey fee request as a result of the District Court's remand instructions pursuant to the District Court's "*Order*" dated April 10, 1998 (the "District Court Order"). Oral argument was held with respect to the Motion and opposition thereto filed by CIRCLE K STORES, INC. (formerly known as The

Circle K Corporation, and hereafter referred to as "Circle K") on October 27, 1998 and November 25, 1998. This Court put its findings of fact and conclusions of law on the record pursuant to Bankruptcy Rule 7052 at the hearing held on November 25, 1998, and instructed Houlihan Lokey to provide certain supplemental information with respect to its request for reimbursement of its attorneys' fees and costs incurred with respect to the prosecution of its fee application, which supplement was timely filed on December 18, 1998. In light of the foregoing, and the Court having considered the Motion (as supplemented), the responses and objections thereto filed by Circle K, the District Court Order and the record in this case, and good cause appearing therefor,

IT IS HEREBY ORDERED, as follows:

1. The Motion and relief requested therein constitutes a core proceeding within which this Court may enter final and dispositive orders pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), and 11 U.S.C. §§ 328 and 330.

2. The requested fees and costs incurred by Houlihan Lokey in the amount of $3,507,699.35 shall be, and hereby are, authorized and allowed. Of that amount, $327,306.04 was a "holdback" that Houlihan Lokey has not been paid (the "Holdback Amount").

3. In addition to the foregoing, Houlihan Lokey shall be, and hereby is, awarded interest on the Holdback Amount at the rate of 5.16% pursuant to and in accordance with 28 U.S.C. § 1961 from and after January 17, 1996. That amount through December 31, 1998 is $48,442.33. Interest will continue to accrue on the Holdback Amount at the per diem rate of $45.40 per day until paid in full.

4. In addition to the foregoing, Houlihan Lokey shall be, and hereby is, awarded reimbursement of expenses associated with obtaining the letter of credit in lieu of a supersedious bond with respect to the United States District Court in the amount of $39,660.88 (the "Letter Of Credit Expenses").

5. In addition to the foregoing, Houlihan Lokey shall be, and hereby is, awarded the amount of $196,044.08 as and for reimbursement of the legal fees and costs incurred with respect to prosecuting its fee application (the "Attorneys' Fees and Costs"). [A memorandum will subsequently be issued by the court explaining this ruling.]

6. In addition to the foregoing, Houlihan Lokey shall be, and hereby is awarded interest at the rate of 5.341% pursuant to and in accordance with 28 U.S.C. § 1961 with respect to the Letter Of Credit Expenses and the Attorneys' Fees And Costs from the date of entry of this Order until paid in full (this interest, along with the interest referred to in paragraph 3, above, collectively referred to as the "Interest").

7. Circle K is hereby ordered and directed to pay forthwith to Houlihan Lokey the Holdback Amount, Attorneys' Fees And Costs, Letter Of Credit Expenses, and accrued Interest as provided herein[, provided there is no prejudice to claims of equal or higher priority. Applicant will serve this Order on debtor & file a service certificate.]

DATED: January 27, 19989.

/s/ George B. Nielsen
HON.
GEORGE B. NIELSEN, JR.
CHIEF JUDGE
UNITED STATES
BANKRUPTCY COURT

Mr. Irwin N. Gold
Mr. Michael A. Kramer
Mr. Andrew B. Miller
HOULIHAN LOKEY HOWARD
& ZUKIN, INC.
1930 Century Park West
Suite 200
Los Angeles, California 90067
(310) 553-8871

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

IN RE:	) Chapter 11
The Circle K. Corporation, Circle K CONVENIENCE STORES, INC., Circle K. Management Company, LAR-LIN, INC., FIRST CIRCLE PROPERTIES, INC., UtoteM, Inc., UtoteM MARKETS OF ARIZONA, INC., U Totem of Alabama, Inc., U-TOTE'M OF COLORADO, INC., U-TOTE'M OF MIAMI, INC., TIC TOC SYSTEMS, INC., MONTERRE PROPERTIES, INC., SHOP & GO, INC., CIRCLE K GENERAL, INC., CIRCLE K HAWAII, INC., COMBINED AVIATION CO., Charter Marketing Company, Charter Marketing Company (Connecticut), MR. B'S OIL CO., INC.,	) Case Nos. 90-5052-PHX-GBN to 90-5075-PHX-GBN) FINAL FEE APPLICATION OF HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. AS FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF DEBENTURE HOLDERS OF THE CIRCLE K CORPORATION FOR COMPENSATION AND REIMBURSEMENT OF SERVICES RENDERED AND EXPENSES INCURRED FOR THE PERIOD JULY 1990 TO APRIL 1992) (Filed Oct. 8, 1993)

MR. B'S FOOD MART, INC., NPI Corporation, OLD COLONY PETROLEUM COMPANY, INC., New England Petroleum Distributors, Inc., and 44th Street & Camelback Limited Partnership.

DEBTORS.

TO THE HONORABLE GEORGE B. NIELSEN, JR., UNITED STATES BANKRUPTCY JUDGE, THE UNITED STATES TRUSTEE, DEBTOR IN POSSESSION, ALL PARTIES IN INTEREST AND COUNSEL:

Preliminary Statement

Houlihan, Lokey, Howard & Zukin, Inc. ("Houlihan Lokey"), financial advisors to the Official debenture Holders' Committee (the "Committee") of the Circle K Corporation ("Circle K" or the "Company") the abovementioned debtor, pursuant to Sections 327 and 330 of Title 11 of the United States Bankruptcy Code (the "Code") and Rule 2016 of the Bankruptcy Rules, for approval of its final fee application (the "Final Fee Application") for compensation and reimbursement of services rendered and expenses incurred for the period July 1990 through and including April 1993 (the "Application Period"), respectfully represents as follows:

1. **Background**

On May 15, 1990, the Circle K Corporation and its principal subsidiaries (collectively, "Circle K" or the

"Company") filed for protection under Chapter 11 of the United States Bankruptcy Code (the "Code") in the District of Arizona. On March 13, 1992, the Company filed with the Court, a consolidated plan of reorganization (the "Plan") and a proposed disclosure statement relating to the Plan (the "Disclosure Statement"). The Plan contemplates the sale of the Company to a third party purchaser, CK Acquisition Corp. (the "Purchaser"), pursuant to Stock Purchases Agreement dated March 13, 1992, as amended and restated as of June 10, 1992, and as further amended on August 6, 1992 (the "Purchase Agreement"). In August of 1992 this Court terminated the Debtors exclusivity period, thus allowing the Committee to file its own Plan of Reorganization. This led to one of the most intense periods of this case, the Confirmation Hearings. The hearings commenced on April 7, 1993 and continued for 10 days through April 20, 1993.

* * *

Houlihan Lokey has rendered substantial services resulting in a benefit to the Debtor's estate during the period covered by this Final Fee Application. Houlihan Lokey respectfully submits that the compensation and reimbursement of expenses requested hearing are reasonable and necessary and commensurate with the benefits received by the estate and therefore should be approved pursuant to the terms of Houlihan Lokey's July 16, 1990 Court approved retention agreement.

WHEREFORE, Houlihan Lokey respectfully requests this Court to enter an order approving: Compensation for professional services rendered during the Application

Period in the amount of $3,300,000 and $207, 699.35 for reimbursement of costs and expenses incurred during the Application Period.

Houlihan, Lokey Howard & Zukin, Inc.

By: /s/ Michael A. Kramer
Michael A. Kramer
Vice President
Financial Restructuring Group

1930 Century Park West
Suite 200
Los Angeles, CA 90067
(310) 553-8871

Financial Advisor to the
Official Debenture Holders
Committee of The Circle K
Corporation

Craig D. Hansen, Esq. (#007405)
Thomas J. Salerno, Esq. (#007492)
Kathleen T. Tobin, Esq. (#016323)
SQUIRE, SANDERS & DEMPSEY
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
(602) 528-4000
Attorneys for HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: THE CIRCLE K CORPORATION, et al., Debtor.	In Proceedings Under Chapter 11 Case Nos. 90-5052-PHX-GBN To 90-5075-PHX-GBN Contested Matter
THE CIRCLE K CORPORATION, Movant, vs. HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., Respondent.	**REPLY OF HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. TO CIRCLE K'S RESPONSE IN OPPOSITION TO HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF ORDER FILED JANUARY 17, 1996 PURSUANT TO RULE 59(e) FED. R. CIV. P.** **Date of Hearing: April 2, 1996** **Time of Hearing: 2:00 p.m.** **Hearing Room: 4**

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. ("Houlihan Lokey"), by and through its duly authorized, undersigned attorneys, hereby respectfully submits its Reply to Circle K Corporation's ("Circle K") "*Response in Opposition to Houlihan, Lokey, Howard & Zukin, Inc.'s Motion for Reconsideration and/or Clarification of Order Filed January 17, 1996. Pursuant to Rule 59(e) Fed. R. Civ. P.,*" filed on March 6, 1996 (the "Response"). This Reply is more fully supported by the following Memorandum of Points and Authorities.

DATED THIS 21 day of March, 1996

SQUIRE, SANDERS
& DEMPSEY
Two Renaissance Square
40 North Central Avenue,
Suite 2700
Phoenix, Arizona 85004

/s/ Kathleen T. Tobin
Craig D. Hansen
Thomas J. Salerno
Kathleen T. Tobin

Attorneys for
Houlihan Lokey

MEMORANDUM OF POINTS AND AUTHORITIES

On January 17, 1996, this Court entered an Order (the "January Order"), denying one-half of Houlihan Lokey's "fees". *In re Circle K Corp.*, 191 B.R. 426 (Bankr. D. Ariz. 1996). Within the statutory 10-day period, Houlihan Lokey filed on January 29, 1996, a "*Motion for Reconsideration and/or Clarification of the January Order*" (the "Motion for Reconsideration"). On the same

day, the Court entered a "*Final Order Granting in Part, and Denying in Part, the Amended Final Fee Application of Houlihan Lokey*" (the "Final Order").

The Motion for Reconsideration requests that the Court clarify and/or reconsider its ruling as to the following issues:

> 1. The use of the term "fees" in the January Order was ambiguous. It is not clear whether the Court was referring only to compensation or to both compensation and expense reimbursement;
>
> * * *

Application"), sought to retain Salomon under Section 328 and Section 1103 of the Code. However, the Salomon Retention Order is silent on the issue. The "*Order Authorizing Circle K's Employment of Merrill Lynch Capital Markets ("Merrill Lynch") as Financial Advisor to Circle K*," dated October 15, 1990, authorized Circle K to retain Merrill Lynch pursuant to Section 327 and Section 328. However, as stated above, Houlihan Lokey's Retention Application and Retention Order cited to no Code sections as governing the terms of its retention. Given the lack of consistency in the applications filed in the case, it is far from clear under which Code section or sections Houlihan Lokey's retention (and subsequent compensation) should be reviewed. The confusion was certainly not unique to this case and reflects the lack of consensus as to how to treat investment bankers in bankruptcy cases at the time. *See infra*, pages 8-13.

Not only did the retention applications and orders provide little, if any, guidance as to the standards to be

applied to the investment bankers in the case, the orders entered by the Court implementing reporting procedures by the professionals were not instructive as to investment bankers.[6] All of the investment bankers were specifically *excluded* from such orders.[7] The Compensation Order does state that investment bankers "will be governed by a separate order"; yet

* * *

to note what the Trustee Letter is and is not. It was not an agreement that was submitted for Court approval, but rather was specifically proposed as a vehicle to allow the *Trustee's Office* to monitor Houlihan Lokey's fees. Interestingly, the Trustee has *never objected* to Houlihan Lokey's fees or costs in this case, and has taken no position with respect to the Original Application or the Amended Final Application of Houlihan Lokey. For the Court to use the Trustee Letter to impose a "meticulously accurate" time keeping requirement on Houlihan Lokey when the Trustee's Office itself has taken no such position is unfair and arbitrary.

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[6] On June 18, 1991, the Court entered and "*Order Approving Compensation and Reimbursement Procedures for Chapter 11 Professionals.*" On December 18, 1991, the Court amended such procedures in the "*Amended Order Approving Compensation Procedure for Chapter 11 Professionals*" (the "Compensation Order").

[7] For example, the Compensation Order which clearly states that the procedures outlined therein do *not* apply to investment bankers, imposed detailed guidelines for professionals seeking interim compensation such as the submission of monthly statements containing billing rates, "detailed" descriptions of services rendered, itemized lists of expenses and brief progress reports. None of these procedures were applicable to investment bankers. *See* Compensation Order, at pages 3-4.

The Court in the January Order holds that Section 330 of the Code governs the review of Houlihan Lokey's request for fees and costs. January Order, at pages 16-17. If the application of Section 330 of the Code is based upon the reference to Sections 327 and 330 in Houlihan Lokey's Original Application, it should not be dispositive given that reference appears in a standard introductory paragraph in a pleading filed without the assistance of counsel. Moreover, to the extent the Court believes the terms of the Trustee Letter implicitly imposed on Houlihan Lokey the requirements of Section 330 and Bankruptcy Rule 2016, Houlihan Lokey submits that those relevant Code provisions do not require investment bankers to maintain "meticulously accurate" time records.

Houlihan Lokey submits that it is unclear whether Houlihan Lokey's initial retention was pursuant to Section 1103,[17] 327 or 328. As discussed above, there was variation among the terms of the orders retaining the various investment bankers in this case and Houlihan Lokey's Retention Application and Retention Order are silent on the issue. Consequently, it is unclear to what extent an analysis under Section 330 is required. Section 330 authorizes the compensation and reimbursement of

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[17] Under Section 1103, committee appointed by the Court has the power to hire "one or more attorneys, accountants, *or other agents*, to represent or perform services" for the Committee. 11 U.S.C. § 1103 (emphasis supplied). Investment bankers have been retained by committees as "other agents". *See* Salomon Retention Application, at page 2, 5 *Collier on Bankruptcy* ¶ 1103.01[6], at 1103-7 (15th ed. 1995); ABI Report, at page 70. A committee, pursuant to Section 328(a), may employ a professional person under Section 1103 on any "reasonable terms and conditions of employment". 11 U.S.C. § 328(a).

expenses of professionals retained in a case. 11 U.S.C. § 330. It also sets forth the standards pursuant to which the amount of compensation is to be determined. *Id.* However, if a professional is retained pursuant to Section 328, an analysis under Section 330 of the Code is subject to the limitations found in Section 328.

B. The Standard Of Reporting Under Section 328

Section 328 of the Code authorizes the retention of a professional under Sections 327 or 1103 "on any reasonable terms and conditions . . . including on a retainer, on an hourly basis, or on a contingent fee basis". 11 U.S.C. § 328. With the courts approval, a debtor or committee may hire a professional person on any reasonable terms and conditions, including on a retainer or flat-fee arrangement. 11 U.S.C. § 328. However, under Section 328, the court is restricted as to when it may modify such terms. As stated by the Ninth Circuit Court of Appeals in *In re Reimers*, 972 F.2d 1127 (9th Cir. 1992):

> Under Section 328, where the bankruptcy court has previously approved the terms for compensation of a professional, when the professional ultimately applies for payment, the court cannot alter those terms unless it finds the original terms, '*to have been improvident in light of developments not capable of being anticipated at the time of the fixing* of such terms and conditions.'

Reimers, 972 F.2d at 1128 (emphasis added). Courts have regularly allowed, pursuant to Section 328, the retention of investment bankers on terms providing for definitive fee arrangements.

* * *

The U.S. Constitution requires that parties receive notice and an opportunity to be heard before being deprived of a substantive right. *Kirk v. INS*, 927 F.2d 1106, 1107 (9th Cir. 1991); *In re Levoy*, 182 B.R. 827, 833 (BAP 9th Cir. 1995) ("It is fundamental that due process of law requires notice reasonably calculated under all the particular circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection."). Houlihan Lokey should have been given notice of, and an opportunity to address, the Court's intent to apply a new "meticulously accurate" standard of reporting. The fact that Houlihan Lokey was given neither resulted in a violation of Houlihan Lokey's right to procedural due process.

IV. CONCLUSION.

Houlihan Lokey submits that the Court should reconsider and/or clarify the January Order denying one-half of Houlihan Lokey's fees and costs for the following reasons.

1. The Court did not clarify whether the imposition of the "meticulously accurate time records" standard related to services rendered and expenses incurred by Houlihan Lokey during the:

(i) Initial Retention Period (*i.e.*, July, 1990 to December, 1991);

(ii) the Second Retention Period (*i.e.*, January, 1991 to April, 1993); or

(iii) neither, because the Court did not draw a distinction between the two.

2. The Court erred in applying the "meticulously accurate time records" standards to the Initial Retention Period and the Second Retention Period because:

(i) the case law dealing with compensation of investment bankers as it existed at the time of Houlihan Lokey's retention and as it exists today does not impose such a stringent standard;

(ii) the "meticulously accurate" standard was not imposed under the terms of the Retention Application or Retention Order;

(iii) the "meticulously accurate" standard was not imposed in this case on Houlihan Lokey or any other investment banker under the terms of the Trustee Letter or any other order of the Court; and

(iv) the application of the "meticulously accurate" standard violates due process.

3. The Court failed to consider the November Submission in ruling on Houlihan Lokey's fee application.

4. In light of all of its filings in connection with its request for compensation and expense reimbursement, Houlihan Lokey has substantially complied with the applicable standards and is entitled to an award of the compensation and expense reimbursement requested.

Therefore, Houlihan Lokey respectfully requests: (i) that the January Order be vacated; (ii) that the Court enter an order awarding Houlihan Lokey the full amount of the fees and costs requested; and (iii) for such other and further relief as this Court deems just and proper under the circumstances.

DATED THIS 21 day of March, 1996.

SQUIRE, SANDERS
& DEMPSEY
Two Renaissance Square
40 North Central Avenue,
Suite 2700
Phoenix, Arizona 85004

/s/ Kathleen T. Tobin
Craig D. Hansen
Thomas J. Salerno
Kathleen T. Tobin

Attorneys for
Houlihan Lokey